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I'm a young lawyer, not a punching bag

How to put a cork in defense's speaking objections

By Phil Johnson

Too often defense attorneys improperly object, trying to bully younger plaintiffs' attorneys during depositions. Such improper efforts to limit the scope of questioning must be defeated.

This article aims to arm young attorneys with tactics and knowledge to control the hostile defense lawyer. Ultimately, these tactics will lay the groundwork for a motion to compel and secure sanctions against the offending defense attorney. Our clients have a right to certain information being obtained. Defense browbeating is not an acceptable tactic. Handled adroitly, speaking objections will only tie defense counsel into expensive knots.

What are speaking objections?

"If you're asking my client…then you already know the answer because they previously testified…which is the answer to your question."

The hypothetical quote above is a classic example of a speaking objection. According to Black's Law Dictionary, a speaking objection is an objection that contains more information (often in the form of argument or suggestion) than needed by the judge to sustain or overrule it. Ideally, all a judge needs to read is something like: "Objection, misstates the witnesses' testimony."

Speaking objections do more than waste time and annoy – they can also function as a form of coaching. The savvy deponent will see their attorney throwing a fit and take the cue to evade or act dumb.

Many superior courts warn against speaking objections. San Francisco County Superior Court, for example, reminds attorneys in its Guidelines of Professional Conduct that they "should avoid, through objections or otherwise, improper coaching of a deponent or suggesting answers." (https://www.sfsuperiorcourt.org/general-info/guidelines-professional-conduct, Section V.) Los Angeles County Superior Court's Guidelines for Civility in Litigation similarly state that "[w]hile a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers." (https://www.lacourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF, Chapter 3 Civil Division, Appendix 3.A(e)(8), adopted in L.A. Sup. Ct. Local Rule 3.26.)

What to say and do when facing speaking objections

When the speaking objections start, firmly and politely ask that they stop. Call out the bad behavior. If it continues, stand your ground.

"Please just state your objection and stop with the speaking objections. Thank you." Or, "Speaking objections are inappropriate. Please stop."

Remember to keep your cool. Defense attorneys know what they are doing and are more likely to keep it up if they see their low-brow tactic get a rise out of you. Do not grant them the satisfaction.

Furthermore, do not forget to stick with the question that elicited the objection. You can ask the stenographer to read the question back to the witness, subject to counsel's objections. This alone demonstrates that you will not be swayed by barking. An objection to a deposition question does not excuse the deponent from the duty to answer unless the objecting party demands the deposition be suspended to allow for the filing of a motion for a protective order. (Code Civ. Proc., §§ 2025.460, subd. (b), 2025.470.) Otherwise, the deponent must answer the question and the testimony will be received, subject to the objection. (Code Civ. Proc., § 2025.460, subd. (b).)

If the stubbornness continues, it is time to inform defense counsel that you are willing to suspend the deposition and file a motion to compel supplemental deposition testimony and seek sanctions. Remind counsel that you already asked politely that they stop with the speaking objections. You'll want to reference the initial warning and this reminder in your motion to compel.

Notice of the motion to compel shall be given to all parties and to the deponent either orally at the examination, or by subsequent service in writing. If notice is given orally, the deposition officer shall direct the deponent to attend a session of the court at the time specified in the notice. (Code Civ. Proc., § 2025.480, subd. (c).)

Your steadfastness may elicit further improper objections. Good. Quote this section of the transcript and drop it into your motion to compel to expose opposing counsel's belligerence to the judge. Showing the judge that you warned opposing counsel multiple times can help you secure sanctions.

Making the motion

A party may move to compel the answer to a deposition question if the deponent either (1) does not answer a question, or (2) does not bring a document requested in the deposition notice/subpoena. (Code Civ. Proc., § 2025.480, subd. (a).) The burden is on defense counsel to justify their objections to unanswered deposition questions asked of non-expert witnesses. (*Kramer v. Superior Court of Los Angeles County* (1965) 237 Cal.App.2d 753, 758-59.) Be sure to include a certified copy of any part of the stenographic transcript of the deposition relevant to the motion not less than five days prior to the hearing. (Code Civ. Proc., § 2025.480, subd. (h).)

Your motion to compel must be filed no later than 60 days after the completion of the record of the deposition transcript and must be accompanied by a meet and

confer declaration. (Code Civ. Proc., § 2025.480, subd. (b).) The 60-day deadline is mandatory. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1408-1410.) Here, it is important to know that objections served in response to subpoenas constitute a record of a deposition within the meaning of Code of Civil Procedure section 2025.480, subdivision (b). (*Unzipped Aooarek, LLC v. Bader* (2007) 156 Cal.App.4th 123, 136.)

It is helpful to cite to cases where courts sanctioned similar bad behavior. Near the end of this article, you will find examples. Reference these cases to unyielding defense attorneys and judges.

Sanctions

If a motion to compel only required an answer at a later time, defense counsel would abuse the discovery process relentlessly. The teeth behind such a motion is sanctions. Don't be afraid to bite.

To begin with, the court may impose sanctions upon any party or attorney engaging in the misuse of the discovery process. (Code Civ. Proc., § 2023.030) Misuse of the discovery process includes making meritless objections to discovery and making evasive discovery responses. (Code Civ. Proc., § 2023.010, subds. (d)-(f).) The court shall also impose a monetary sanction where a deponent fails without justification to answer a question. (Code Civ. Proc., § 2025.480, subd. (f).)

The court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., § 2025.480, subd. (j).) Additionally, the disobedient deponent may face an issue sanction, evidence sanction, or terminating sanction. (Code Civ. Proc., § 2025.480, subd. (k).)

Case examples of sanctions for speaking objections

Citing to analogous cases will help you win your motion and keep defense counsel in line. Feel free to reference the following cases.

Hammer Lane RV & Mini-Storage LP. v. HLMS LLC, (2008) Cal.Super. LEXIS 1034

A Sacramento County Superior Court judge granted a motion to compel further responses and awarded sanctions in the amount of $9,758.40 after reading a deposition transcript in which defense counsel "relentlessly, and frivolously asserted unfounded objections, speaking objections, and coached the witness." The transcript, submitted to the court, included more than 100 examples of defense counsel lodging speaking objections and instructing the witness not to answer. The court admonished defense counsel for engaging in "a deliberate strategy to thwart plaintiff's right to obtain discovery and prepare for trial." The court went on to grant a motion for the appointment of a referee at defense's expense.

Ruden v. C.R. Bard, (2017) Cal.Super. LEXIS 6657

During a Person Most Qualified deposition, defense counsel instructed the deponent to not answer the question 167 times. One hundred and forty of those instructions erroneously cited Evidence Code section 1157. San Francisco County Superior Court Judge Harold Kahn found those objections lacked requisite substantial justification. "It is black letter law that other than to protect privileged information or privileged-like information such as information exempt from discovery by section 1157, it is impermissible for the deponent's attorney to instruct the deponent not to answer."

People v. Nieves, (2021) 11 Cal.5th 404

Throughout a capital murder trial, the judge regularly admonished defense counsel for violating the court's rule against speaking objections. The subject was one of many that sparked conflict between counsel and the court during trial. After repeated warnings, the trial judge imposed a $500 sanction pursuant to Code of Civil Procedure section 177.5 for defense counsel's speaking objections. Nevertheless, defense counsel persisted. The trial judge grew so frustrated with defense counsel's ongoing speaking objections that it issued six additional sanctions – one for a discovery violation, three more for speaking objections, and two for commenting on testimony and evidence. Sanctions were upheld on appeal.

La Jolla Spa MD, Inc. v. Avidas Pharms., LLC, (2019) U.S. Dist. LEXIS 148721

"Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney," wrote U.S. Magistrate Judge William V. Gallo in his order granting plaintiff's motion for sanctions. While defending a deposition, defense counsel interrupted at least 39 times to lodge speaking objections. Plaintiff's counsel included the following excerpt in his successful motion:

Q. Did Avidas have Harmony manufacture new Vitaphenol anti-aging toner?
A. Yes.
MS. CHOVANES: You know what? While there's no question, I'm going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker?
MR. RYAN: No.
MS. CHOVANES: Why not, Counsel?
MR. RYAN: I think it's important that we go through each one.
MS. CHOVANES: Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time.

The disruptive counsel, who had appeared pro hac vice, was ordered to pay $28,502.03 in sanctions, self-report to the State Bar of Pennsylvania, and to attach as an exhibit the order granting sanctions to any pro hac vice application for admission before the U.S. District Court for the Southern District of California for the rest of her legal career.

Conclusion

Honing your deposition skills can be challenging enough as it is. Dealing with improperly hostile defense counsel should not be part of the experience. When the speaking objections start, push back. Begin with stern, polite warnings. If they continue, demonstrate that you are willing to file a motion and seek sanctions. Should you feel the record is outlandish enough to garner sanctions, stand up and suspend.

Walk into your next deposition with the confidence and knowledge that can stare down the bully. Court guidelines, statutes, and case law are on your side. Use them. Doing so will help you establish the reputation as a plaintiff's lawyer who is not to be messed with.


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